No. 88-605

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,

Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, et al.,

Appellees.

On Appeal from the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, AMERICAN ACADEMY OF PEDIATRICS, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN FERTILITY SOCIETY, AMERICAN MEDICAL WOMEN'S ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION AND AMERICAN SOCIETY OF HUMAN GENETICS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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EXHIBIT A

Accordingly, the statute is unconstitutional. See *Colautti v. Franklin*, 439 U.S. 379 (1979).

B. Section 188.205 of the Missouri statute, which the court of appeals held literally precludes a physician from "consulting," i.e., making any comment, about having an abortion unless necessary to save the mother's life, is unconstitutional. The statute clearly interferes with a physician's ethical obligations to discuss fully and accurately all information necessary to permit the patient to make an informed treatment choice. By mandating "a state-imposed blackout on the information necessary to make a decision" (851 F.2d at 1080), Section 188.205 forces a constitutionally impermissible "straightjacket" upon the physician's efforts fully to inform his or her patient. *City of Akron*, 462 U.S. at 445; *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

ARGUMENT

I. INDIVIDUALS HAVE A FUNDAMENTAL RIGHT TO MAKE DECISIONS ABOUT THEIR MEDICAL CARE, AND STATE LAWS WHICH INTERFERE WITH THAT RIGHT CAN BE JUSTIFIED ONLY IF THEY ARE NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST.

Appellants and their *amici curiae*—particularly the United States—ask this Court to overrule a decision interpreting the Constitution: *Roe v. Wade*, 410 U.S. 113 (1973). In so doing, they ask the Court to take two major steps. First, they propose altering the balance struck previously by the Court between the interests of the pregnant woman and those of the state. Second, they ask the Court to declare that no fundamental privacy right exists

in this case at all. They make this second, extra-ordinary request because they believe that the privacy right recognized in *Roe* cannot properly be derived from the Constitution. See U.S. Brief at 9-24.

Given the diversity of views of *amici's* members, this brief does not take a position on whether the balance of interests struck in *Roe* should be modified. However, *amici* firmly believe that the Court should reject the invitation of the federal government to deny constitutional protection to the well-established right of privacy that this Court applied in *Roe v. Wade.*

In the first place, the holding of this Court on the privacy issue was a common sense application of settled constitutional principles to a situation where a woman must make an individual choice about a matter which the Court found would have profound implications for her health and life. Since the same profound individual implications the Court identified in 1973 still exist (see *supra* at 3-23), the decision should be reaffirmed. Second, the holding on the privacy issue simply reflected the historic tradition, embodied in our common law, of recognizing that all medical treatment decisions ordinarily should be made by the patient, after consultation with a physician concerning the risks and benefits of treatment. Third, the holding on the privacy issue is fully consistent with the holdings of this Court in applying other abstract constitutional principles to medical treatment situations, where the Court has always respected the dignity of the individual and his or her right to obtain desired medical care. Each of these reasons independently supports the Court's holding that the decision to terminate a pregnancy implicates a fundamental right.

A. The Individual's Fundamental Privacy And Liberty Right To Be Free Of Governmental Interference Extends To Medical Treatment Decisions.

This Court has long recognized that, as part of the "liberty" protected by the Constitution's Due Process Clauses, the Constitution guarantees to each individual certain areas or zones of privacy which remain free from unjustified government interference or intrusion. See *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684 (1977). The Court's privacy rulings rest on the theory that the constitutional text does not, on its face, specify all rights that warrant constitutional protection from executive or legislative intervention.[27]

The essence of the liberty interest denominated as the right to privacy is the concept that an individual in certain circumstances has a right to be let alone, *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), and that the individual must thus have "independence in making certain kinds of important decisions."

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27 The concept of "liberty" in the Due Process Clause of the Fourteenth Amendment is a "broad" one. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). For this reason, it has long been recognized as protecting certain personal choices. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

Moreover, privacy is hardly the only value that has received constitutional recognition without being expressly specified in the constitutional text. For example, this Court found a right to travel in the Constitution without requiring any explicit textual basis. *Shapiro v. Thompson*, 394 U.S. 618 (1969). In addition, although "federalism" is nowhere mentioned in the Constitution, the doctrine is part of the constitutional scheme. *See Coyle v. Smith*, 221 U.S. 559, 565 (1911); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

Whalen v. Roe, 429 U.S. 589, 599-600 (1977). As this Court has recognized, that right encompasses matters concerning marriage and procreation. The specter of governmental agents unnecessarily interfering with such inherently private, individual decisions is antithetical to basic concepts of individual liberty in a free society. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Loving v. Virginia*, 388 U.S. 1 (1967); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). See also *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).[28]

Moreover, and of particular significance to *amici* and their members, the right to privacy which is derived from the concept of liberty also encompasses the right of an individual to make decisions about his or her medical care and treatment. As our discussion of the health implications of pregnancy and abortion makes clear, the Court's assumptions about the importance of this particular medical treatment decision are as true today as they were in 1973. Women face physiological and psychological risks and burdens when they become pregnant. Under this Court's decisions, individual choices become fundamental rights because they have a powerful and perhaps irreversible

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28 The United States seems to accept *Griswold v. Connecticut*, 381 U.S. 479 (1965), as a legitimate decision on the ground that enforcement of a statute prohibiting the use of contraceptives would require wholly impermissible governmental prying into the private lives of individuals. (U.S. Brief at 12 n.9.) Having accepted *Griswold*, however, the government's textual theory (U.S. Brief at 23-28) for rejecting *Roe v. Wade* collapses, because this Court did not locate the right recognized in *Griswold* in a specific constitutional provision and could not, as the United States suggests, have located it in the Fourth Amendment alone. *See Carey v. Population Serv. Int'l*, 431 U.S. 678, 687 (1977). The United States' brief therefore bears "witness that the right of privacy which passes for recognition here is a legitimate one." *Griswold*, 381 U.S. at 485.

impact on who we are and who we will become. See *Fitzgerald v. Porter*, 523 F.2d 716, 719-20 (7th Cir. 1975): "These cases do not deal with the individuals' interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's destiny." Accordingly, it seems plain that the health effects of pregnancy and abortion, by themselves, should be sufficient to support the holding in *Roe* that the woman's choice should be constitutionally protected.

In holding that the abortion decision involved a fundamental right, the Court correctly noted that considerations of protecting the woman's health were vital. Specifically, the Court observed that:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved.

Roe, 410 U.S. at 153. Similarly, in explaining the basis for the protections afforded first trimester abortions, the Court identified the important health concerns implicated by the woman's choice. "[U]ntil the end of the first trimester mortality in abortion may be less than mortality in normal childbirth . . . . This means . . . that . . . the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be termi-nated." *Id.* at 163. See also *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 429 n.11 (1983).

The full extent of the importance attached to the pregnant woman's interest in being able to preserve her life and health is perhaps most apparent, however, in the

context of third trimester abortions. At this stage, the State's interest in protecting fetal life is considered compelling. *Roe*, 410 U.S. at 163-165. Nonetheless, this Court has recognized that protection of the pregnant woman's health interests is still considered "paramount." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 769 (1986). Consequently, while *Roe* otherwise permitted proscription of third trimester abortions, it did not do so in instances where abortion "is necessary to preserve the life or health of the mother." *Roe*, 410 U.S. at 163-164.

The importance of the health considerations underlying *Roe's* holdings has led this Court to observe:

> In concluding that the freedom of a woman to decide whether to terminate her pregnancy falls within the personal liberty protected by the Due Process Clause, the Court in *Wade* emphasized the fact that the woman's decision carries with it significant personal health implications—both physical and psychologi- cal. . . . [I]t could be argued that the freedom of a woman to decide whether to terminate her pregnancy for health reasons does in fact lie at the core of the constitutional liberty identified in *Wade*.

Harris v. McRae, 448 U.S. 297, 316 (1980).

To the extent that the right in this case depends upon the importance to the woman of the consequences of her choice (see *supra* at 3-23), the decision whether or not to have an abortion should be considered a fundamental right.

B. This Court's Recognition That Every Individual Has A Fundamental Right To Make Decisions About His Or Her Medical Treatment Is Supported By The History And Traditions Of This Nation.

The Court's treatment of the woman's choice as a protected interest under the Constitution is supported by more than a common sense application of this Court's liberty and privacy rulings to the medical facts surrounding abortions. The Court's handling of the constitutional status of a medical treatment decision by the individual is also supported independently by the traditional respect this nation has always granted to the individual's interest in making personal medical treatment decisions in consultation with a physician.

The substantive guarantees afforded by the Due Process Clause encompass the protection of interests that are "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.). In deciding whether a particular interest is so embedded, the Court's judgment has histor-ically been informed by whether the interest was protected at common law. The Court has stated that the liberty guaranteed by the Fourteenth Amendment encompasses "the right of the individual . . . to enjoy those privileges long recognized in common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

In this regard, it is significant that: "No right is held more sacred, [n]or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person." *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251 (1891). An individ-ual's interest in being permitted to make personal decisions

affecting bodily security, free from government coercion, is thus a traditionally protected interest.[29]

The interest in protecting the physical security and health of one's body is an ancient one. Blackstone classified this interest as one of the three principal articles—later embodied in our Constitution as "life, liberty and property"—constituting the "rights of the people of England." "[T]he preservation of a man's health from such practices as may prejudice or annoy it . . . are rights to which every man is entitled. . . ." W. Blackstone, *Commentaries* 1:134 (1765).

Indeed, both the common and statutory law of this country have consistently recognized the importance of the individual's interest in being able freely to make decisions designed to limit risks to his or her own health. In the law of torts, this interest is reflected, for example, in the requirement of informed consent to medical treatment. The principle which supports this doctrine is that the patient has a right to weigh whatever risks attend the particular treatment and to decide if they are intolerable.

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29 Our general tradition of protecting the individual against coerced medical decisions posing a threat to health is more relevant than the narrow history of abortion regulation for determining the fundamental rights issue before this Court. That history of abortion is misleading because restrictions on the practice arose during an era when the procedure was dangerous. As noted in *Roe*, 410 U.S. at 148-49, "when most criminal abortion laws were first enacted, the procedure was a hazardous one for women . . .[;] [a]bortion mortality was high." Even then, abortion was frequently permitted when superceding [sic] health risks were present, *e.g.*, when necessary to preserve the life of the woman. *Id.* at 138-39. However, "[m]odern medical techniques have altered this situation," as this Court recognized in *Roe*, *id.* at 149, so that abortion restrictions that once served to protect the woman's health could now jeopardize her health. *See supra* at 8-13.

> The root premise is the concept, fundamental in American jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . .'

Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) (quoting *Schloendorff v. Society of New Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914) (Cardozo, J.)). Accord *Natanson v. Kline*, 186 Kan. 393, 410, 350 P.2d 1093, 1106, *clarified*, 187 Kan. 186, 354 P.2d 670 (1960); F. Harper & F. James, *The Law of Torts* § 17.1 (2d ed. 1986).

Similarly, in order to guard the patient's ability to take steps essential to protecting his or her health, virtually every state in this country has recognized a physician-patient privilege. "The rationale of this privilege is to promote health by encouraging a patient to fully and freely disclose all relevant information which may assist the physician in treating the patient." *Huzjak v. United States*, 118 F.R.D. 61, 63 (N.D. Ohio 1987). See 8 J. Wigmore, *Evidence* § 2380a (McNaughton ed. 1961).

These examples illustrate this country's long-standing tradition of treating potential infringements upon an individual's ability to protect his or her health and autonomy with the utmost seriousness. That tradition is, in turn, constitutionally reflected in the Due Process Clause's substantive protection of life and liberty. "[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). Accord *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) ("Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security"). For that reason, the right to protect

one's bodily security, and to make medical decisions to that end, has always been deemed to require more than a mere minimal justification for government infringements. Under those principles, a woman's choice whether or not to terminate her pregnancy should be deemed a fundamental liberty interest protected by the Due Process Clause.

C. This Court's Recognition That Every Individual Has A Fundamental Right To Make Decisions About His Or Her Medical Treatment Is Supported By This Court's Approach To The Protection Of Health Under Specific Constitutional Provisions.

The United States criticizes (U.S. Brief at 12) the holding that a woman has a fundamental right embodied in the liberty component of the Due Process Clause to choose the medical treatment that she wishes her physician to provide as not "rooted in accepted principles." But the legal reasoning that supports the right in this context is essentially the same as the approach taken by this Court in applying other constitutional provisions, with language that is equally inexact, to issues concerning the provision of medical treatment generally. Thus, in the Fourth Amendment context, this Court has held that "our society recognizes a significantly heightened privacy interest" when government interference in medical decisions creates any increased risk to individual health. *Winston v. Lee*, 470 U.S. 753, 767 (1985).

In *Winston*, the government sought to perform a surgical procedure to remove a bullet from a criminal defendant's body. Presented with conflicting evaluations of the risk of the surgery, the court of appeals concluded that "the statistical risk of actual physical harm . . . is . . . very low [and could] be considered minimal." *Lee v. Winston*,

717 F.2d 888, 900 (4th Cir. 1983). Nonetheless, this Court reasoned:

> The operation sought will intrude substantially on respondent's protected interests. The medical risks of the operation, although apparently not extremely severe, are a subject of considerable dispute; *the very uncertainty militates against finding the operation to be "reasonable."*

Winston, 470 U.S. at 766 (emphasis supplied). The Court held that, in the absence of compelling countervailing interests, the very possibility of even marginal medical risk precluded the endangering government action. *Id.* As a matter of constitutional interpretation, the *Winston* Court's derivation of a privacy interest from the Fourth Amendment's general protection against "unreasonable searches and seizures" to protect a patient's medical treatment choice cannot be distinguished from the *Roe* Court's derivation of a privacy interest from the liberty clause to protect a conceptually identical right to make a medical treatment choice.

Similarly, the constitutional value attached to protection of personal health is also evident in this Court's decisions under the Eighth Amendment. This Court has held that the Eighth Amendment's proscription of cruel and unusual punishments is violated by "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Thus, even an individual whose liberty interest has been constitutionally abridged retains a privacy right to receive medical care as part of the abstract protection against cruel and unusual punishment. Again, there is no basis for arguing that the process of recognizing this fundamental right of a prisoner to receive medical care is derived from anything more concrete or more settled

than the right to make an individual treatment decision which can be drawn from the Due Process Clause.

Not only is the process of analysis under these other provisions similar to what *amici* propose here for the Due Process Clause, but also the entire fabric of the Court's holdings regarding medical treatment decisions reflects a basic pattern in the Constitution which supports the right asserted in this case. See *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974) (medical care constitutes "a basic necessity of life"). Repeated protection for a right under disparate sections of the Constitution indicates that the right is fundamental to and underlies the design of the Constitution itself. That is the case here.

The consistent close scrutiny by this Court of govern-ment attempts to interfere with personal interests in health and bodily security is not inadvertent. Rather, it demon-strates that these interests warrant the "fundamental" constitutional status that they have been granted throughout this Court's decisions. In sum, the Court should reaffirm both that there is a right of privacy generally incorporated into the "liberty" component of the Due Process Clauses and that the right extends to individual medical treatment decisions, including whether or not to terminate a pregnancy.

D. State Interference With A Fundamental Right Triggers Searching Judicial Examination Pursuant To The Compelling State Interest Test.

State "interference" with or "infringement" of a fundamental right triggers a searching judicial examination pursuant to the compelling state interest test. See *Roe v. Wade*, 410 U.S. at 155; *City of Akron*, 462 U.S. at 427. See also, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241

(1974). A state law which infringes a fundamental right is "presumptively unconstitutional," *Harris v. McRae*, 448 U.S. 297, 312 (1980) (quoting *Mobile v. Bolden*, 446 U.S. 55, 76 (1980)). It cannot withstand judicial scrutiny unless the state has a "compelling interest" and, in the abortion context, two elements of the compelling state interest test are met: the specific means chosen must be "reasonably related" to the state's compelling goals and thus consistent with sound medical practice; and those specific requirements must be carefully tailored to the state's purposes. Failure to satisfy either of these elements is fatal to the state's effort to infringe the woman's fundamental right. *City of Akron*, 462 U.S. at 426-31.

In much fundamental rights adjudication, a holding of infringement will doom a law because the state has no constitutionally recognized "compelling interest" in such an infringing enactment. In the abortion context, however, this Court has clearly recognized two "compelling" goals which can justify regulation of the decision whether or not to terminate a pregnancy. Thus, the state has a compelling interest in protecting the mother's health. *Roe v. Wade*, 410 U.S. at 162-163; *City of Akron*, 462 U.S. at 428. Similarly, the state has a compelling interest in preserving the potential life of the fetus. *Roe v. Wade*, 410 U.S. at 162-163; *City of Akron*, 462 U.S. at 428.

However, the presence of a compelling purpose does not, *ipso facto*, ensure the constitutionality of the state's particular infringement of the fundamental right. As the Court explained in *City of Akron*, 462 U.S. at 434, "the existence of a compelling state interest in health, however, is only the beginning of the inquiry." Thus, a state's requirements must be "reasonably relate[d]" to the compel-ling goals. *Roe v. Wade*, 410 U.S. at 163; *City of Akron*, 462 U.S. at 434 n.19 (quoting *Doe v. Bolton*, 410 U.S. 179, 194 (1973). Typically, this "reasonably related"

element of the test involves an inquiry into whether the state's requirements have a reasonable medical basis. "The State's discretion to regulate . . . does not, however, permit it to adopt abortion regulations that depart from accepted medical practice." *City of Akron*, 462 U.S. at 431. See *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 487 (1983) (Powell, J.); *Planned Parenthood v. Danforth*, 428 U.S. 52, 78-79 (1976).

Second, state laws that interfere with or burden the right must be carefully tailored to the state's objective. See *Roe v. Wade*, 410 U.S. at 165; *Planned Parenthood v. Ashcroft*, 462 U.S. at 485 n.8; *City of Akron*, 462 U.S. at 438. The law must, in other words, not be overbroad and must, therefore, advance the compelling state interest without any additional and unnecessary interference with the fundamental right. *City of Akron*, 462 U.S. at 438-439.

Application of the compelling state interest test and its elements, and the striking of any balance between fundamental rights and compelling state interests, ultimately turns, of course, on the nature of the fundamental rights that are involved. The United States, however, proposes that in determining the permissible scope of state inter-ference with the abortion decision, under either a "compelling interest" or "undue burden" analysis, this Court should only take account of the effects of such interference on the woman's "interest in procreational choice." U.S. Brief at 22 n.16. This proposed approach is deeply flawed. It suggests that the Court should ignore the woman's fundamental interest in medical treatment decisions. Instead, abortions would be permitted only if the woman was "coerced" into becoming pregnant.

The United States' proposed analysis leaves no room for the woman to terminate a pregnancy to protect her own health or even to save her life. Obviously, denying her an

abortion at that point is wholly irrelevant to the prior decision "whether or not to beget or bear a child," U.S. Brief at 22 (quoting *Carey v. Population Serv. Int'l*, 431 U.S. 678, 685 (1977)), which the government asserts should be the only "liberty interest" at stake. But, this Court already has held that the state cannot insist that there be a "trade-off" between the life of the mother and the survival of the fetus. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 768 (1986), *Colautti v. Franklin*, 439 U.S. 379, 400 (1979).[30]

It is difficult to accept that the government believes that serious threats to a woman's health or even her life are not relevant in assessing the balance between the woman's right and the state's interests. The manifest shortsightedness of the government's reasoning undermines completely its proposed approach. In our view, it would be inconsistent with any reasonable notion of a "narrowly tailored" statute to hold that, in order to protect its interest in potential life, a state may, regardless of circumstances and irrespective of the severity of the threat to the woman's life or health, flatly prohibit all women from choosing, in consultation with their physicians, to have an abortion performed.

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30 The direct one-to-one trade-off is what distinguishes this case from *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). It is one thing to hold that the state can compel an individual to face a limited health risk in order to protect a significant number of other individuals and where even the specific individual's health is placed at significant risk if he or she is allowed to "opt out." It is fundamentally different to say that society can impose a direct and immediate burden and risk on one individual in order to benefit another.

II. SECTIONS 188.029 AND 188.205 OF THE MISSOURI STATUTE UNCONSTITUTIONALLY INFRINGE THE FUNDAMENTAL RIGHT OF PATIENTS TO MAKE MEDICAL DECISIONS IN CONSULTATION WITH THEIR PHYSICIANS.

Given the fundamental nature of the woman's right in being able to decide whether to terminate a pregnancy, there are two types of state action which trigger heightened judicial scrutiny. First, heightened scrutiny is required when state laws interfere with the *woman's* decisions whether to enter into a physician-patient relationship with respect to abortion and whether or not to terminate her pregnancy. This Court has recognized specific situations when the compelling interest test should be applied: when a state abortion law imposes certain additional health risks on the woman; when a state law attempts to influence the woman's informed choice between abortion or childbirth through the physician-patient relationship; or when a state law imposes costs on a woman unique to the abortion procedure and out of proportion to any health benefits.[31]

Second, heightened scrutiny is appropriate when state laws interfere with a *physician's* ability to enter into a physician-patient relationship, to counsel the patient and to provide medically indicated care and treatment pertaining to the patient's pregnancy termination decision. Thus, there is infringement when a state law interferes with a physician's best medical judgment or is otherwise incon-sistent with the state of medical knowledge and sound

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31 *See, e.g., Harris v. McRae*, 448 U.S. at 328 (White, J., concurring) (additional health risks); *City of Akron*, 462 U.S. at 444 (influence woman's choice); *Planned Parenthood v. Danforth*, 428 U.S. at 69 (share decision-making authority); and *City of Akron*, 462 U.S. at 435, 438, 447 (costs unique to abortion).

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BRIEF FOR BIOETHICISTS FOR PRIVACY AS AMICUS CURIAE SUPPORTING APPELLEES

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EXHIBIT B

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. 88-605

WILLIAM L. WEBSTER, et al.,
Appellants,
v.
REPRODUCTIVE HEALTH SERVICES, et al.,
Appellees.

On Appeal from the United States Court of Appeals
For the Eighth Circuit

BRIEF FOR BIOETHICISTS FOR PRIVACY AS AMICUS CURIAE SUPPORTING APPELLEES

Interest of Amicus

Amicus is an ad hoc group of 57 philosophers, theologians, attorneys, and physicians from 20 states and the District of Columbia who teach medical ethics to medical students and/or physicians, or who have a major profes-sional interest in medical ethics. Although the precise beliefs and practices of the members of this group vary, as do their professional and religious backgrounds, the members believe that permitting competent adults to make important, personal medical decisions in consultation with their physician is a fundamental principle of medical ethics, and that the doctor-patient relationship deserves the consti-tutional protection this Court has afforded it under the right of privacy. Medical ethics, individual autonomy, and professional accountability will all be fostered by preserv-

ing the right of privacy. Compromising the right of privacy, and substituting the state as the decisionmaker in the doctor-patient relationship, would undermine principles of medical ethics and compromise principles of good patient care and good medical practice to the detriment of physicians and patients alike.

Summary of Argument

I

Missouri asks this Court to renounce a right of privacy which this Court has described as "older than the Bill of Rights." This Court has provided lawmakers with a consistent and coherent set of parameters for identifying what the right of privacy protects, especially with respect to decisions about abortion. Abandonment of the right of privacy would permit state legislatures to control personal decisions that are now made in the doctor-patient relationship. Without the protection of the right of privacy, each legislature would be free to impose its values by dictating the outcome of what are and should be personal medical care decisions.

II

A. As this Court has recognized, a woman's right to decide to terminate a pregnancy is exercised within the context of the doctor-patient relationship. The ancient tradition of safeguarding the privacy and freedom of unfettered communication between doctor and patient is embodied in ethical precepts which the law recognizes and supports. The Missouri legislation is a direct, govern-mental attack on this relationship, thereby jeopardizing patients' rights, and compromising physicians' ethical obligations to their patients.

B. Both legal and ethical principles require physicians to discuss health risks that are caused or exacerbated by pregnancy and information concerning possible fetal genetic

or congenital disorders. The Missouri statutes prohibit such discussions by publicly-funded physicians if they may lead to a decision to abort. Physicians' speech is censored and patients are deprived by the state of critical information on which to base decisions about pregnancy. The ethical practice of medicine is made unlawful and the health and well-being of pregnant patients is likely to be seriously jeopardized as a result. Missouri gives "any taxpayer" of the state standing to enforce its restrictions in the courts. Thus, whatever is said or done in the privacy of the doctor-patient relationship is subject to public scrutiny at any time.

C. Without the constitutional right of privacy, there would be no constitutional principle that would prevent a state from prohibiting patients from using *any* medically recognized and accepted treatments which a majority of legislature happens to disfavor. Worse, a state would be free to prevent physicians from even telling their patients about such treatment. This differs dramatically from a state's merely refusing to pay for certain treatments.

Advances in medical science have made possible new methods of treatment for a wide variety of medical condi-tions, often controversial, and with the potential for profound consequences for the patient. Scientific progress has increased the importance of the doctor-patient relationship, for it is only in this context that difficult personal medical decisions can be made taking into consideration all of the medical and personal consequences that may ensue. Thus there is even more reason today to uphold the consti-tutional protection of decisions made in the privacy of the doctor-patient relationship than when *Roe v. Wade* was decided. For these reasons the decision of the court of appeals should be affirmed.

Argument

I. THE CONSTITUTIONAL RIGHT OF PRIVACY WHICH PROTECTS THE RIGHT TO MAKE PERSONAL MEDICAL DECISIONS IS A FUNDAMENTAL RIGHT AND A CENTRAL AMERICAN VALUE WHICH IS "IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY" AND THE COURT SHOULD CONTINUE TO PROTECT IT.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court, in striking down a state statute forbidding married couples from using contraceptives, stated, "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system." *Id.* at 486. In explaining this fundamental constitutional right of privacy, the Court recognized that there are decisions that are so personal, so private, and that so profoundly affect the individuals who must live with the consequences, that the state has no power to interfere in those decisions, absent a compelling interest. Since *Griswold*, this Court has applied the right of privacy to protect an unmarried person's right to decide "whether to bear or beget a child," *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), and decisions whether or not to terminate a pregnancy. *Roe v. Wade*, 410 U.S. 113 (1973).

When the State of Missouri and the United States as amicus curiae ask this Court to overrule *Roe v. Wade*, they are asking that the most private decision that can be made by any individual be removed from that affected individual and turned over to a state legislature. We respectfully submit that this Court should not take such action.

In *Griswold* this Court recognized that the private relationship between a husband and wife prevented the state from intruding on their contraceptive decisions. In *Roe* the Court recognized the privacy of the doctor-patient relationship. While *Roe* further defined a woman's right to make

reproductive decisions, it also recognized that the pregnant woman required the advice and counsel of a licensed physician. Thus, in *Roe* the Court concluded that during the first trimester "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." 410 U.S. at 163. Later the Court stated that during the first trimester "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. The Court also pointed out that its decision "vindicates the right of the physician to administer medical treatment according to his professional judgment" up until the point that compelling state interests justify intervention. *Id.* at 165-66. Finally, the Court pointed out that the abortion decision is 'inherently, and primarily, a medical decision" for which "basic responsibility" rests with the physician. *Id.* at 166.

Thus, as *Griswold* protected the privacy of the marital relationship, *Roe* protected the privacy of the physician-patient relationship. "The right of privacy has no more conspicuous place than in the physician-patient relationship . . ." *Doe v. Bolton*, 410 U.S. 179, 219 (1973) (Douglas, J., concurring). In this relationship both the physician and the pregnant woman must agree that termination of pregnancy is appropriate in order to have this medical procedure performed. Whether abortion is an appropriate option for a *particular* patient is, by definition, a decision that must be made by the doctor and the patient in each case. It is the right to make particularized personal decisions that is at the core of *Roe* and its progeny, and it

is this right that Missouri and the United States desire to destroy.[32]

In *Doe v. Bolton*, the court found that the restrictions Georgia had placed on abortion violated both the patient's and physician's freedom. For example, Georgia's require-ment that two licensed physicians must agree with a woman's personal physician's judgment that an abortion is appropriate, and that a hospital committee of at least three other doctors must concur in the abortion decision violated the privacy protection of both the doctor and patient. In the Court's words, "The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview." 410 U.S. at 197.

Since *Roe* this Court has reviewed a large body of legislation designed to deny patients and physicians their right to make personal and professional judgments about how best to deal with a patient's pregnancy. As even the United States concedes, "Roe and its progeny have resolved most of the central questions about the permissible scope of abortion regulation. . . ." Brief for the United States as Amicus Curiae Supporting Appellants at 21, n. 15. Through sixteen years of constitutional adjudication this Court has provided lawmakers with a consistent and

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32 Justice Douglas, concurring in *Doe v. Bolton*, 410 U.S. at 211, described the right of privacy as "*freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.*" He also thought of it as "*freedom to care for one's health and person, [and] freedom from bodily restraint or compulsion . . .*" *Id.* at 213.

coherent set of constitutional guidelines in this area.[33] Laws that recognized and protected the physician-patient relationship have been upheld, and laws designed to weaken or destroy that decision-making unit have been struck down. Thus, in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976), the Court readily upheld a general informed consent provision, even as it applied to the first trimester, because not only did it not burden the abortion decision, it enhanced the physician-patient relationship. On the other hand, the Court has struck down a provision requiring physicians to recite a "parade of horribles" because it intruded "upon the discretion of the pregnant woman's physician." *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 445 (1983). Under this statute every physician was made an agent of the state who was required to recite the state's anti-abortion message to

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33 A review of the Court's abortion decisions indicate that it has used the following "tests" in various combinations to evaluate the constitutionality of abortion statutes:

1. Has the state placed an obstacle in front of the woman or otherwise significantly burdened the pregnant woman's ability to choose or obtain an abortion?
2. Is abortion being treated differently from other similar medical or surgical procedures?
3. Does the regulation interfere with the treating physician's exercise of professional judgment?
4. Does the regulation conflict with, or is it stricter than, accepted medical and scientific norms?
5. Is the regulation designed to protect maternal health where no less intrusive or less expensive alternative will do?
6. If a postviability rule, does the regulation protect the fetus without putting the mother in jeopardy?

Annas, *Webster and the Politics of Abortion*, 19 Hastings Center Report 36 (March/April 1989), citing Glantz, "Abortion: A Decade of Decisions," in *Genetics and the Law III* 305 (A. Milunsky & G. Annas, eds. 1985).

every patient, regardless of her individual need or desire.

A similar statute was involved in this Court's most recent case on abortion law. The Court reiterated that forcing a physician to provide prescribed information "makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 763 (1986). The Court summarized the situation aptly: "All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician." *Id.*

The controversy that ranges over abortion is not resolvable through reason, logic, or majority vote. It is an emotional issue governed by one's background, religious upbringing, and moral beliefs. The post-*Roe* state statutes were not health or safety laws, but rather means to control physicians and their patients so that a particular legis-lature's philosophical position could be imposed on pregnant women and their physicians. The Court in *Roe* recognized this problem when it pointed out that there is great diversity of opinion among philosophers, theologians and scientists about when life begins. It further recognized that the judiciary is certainly in no position to resolve this issue. 410 U.S. at 159. This is equally true of legisla-tures. As a result, the Court concluded that "we do not agree that, by adopting one theory of life Texas may over-ride the rights of the pregnant woman that are at stake." *Id.* at 162.

Justice Stevens, concurring in *Thornburgh*, made a similar point: "In a sense, the basic question is whether

the 'abortion decision' should be made by the individual or by the majority 'in the unrestrained imposition of its own, extraconstitutional value preferences.'" 476 U.S. at 777-78. That is also the issue posed in this case. Justice Stevens was correct in pointing out that without the safeguards in *Roe*, there is essentially no way to restrain what the state may do in imposing its value judgments on the individual:

> . . . if federal judges must allow the State to make the abortion decision, presumably the State is free to decide that a woman may *never* abort, may *sometimes* abort, or as in the People's Republic of China, must *always* abort if her family is already too large. In contrast, our cases represent a consistent view that the individual is primarily responsible for reproductive decisions, whether the state seeks to prohibit repro-duction or to require it.

Id. at 778, n. 6 (emphasis in original, citations omitted).

The pre-*Roe* world to which Missouri and the United States would like us to return is a world in which the State would have essentially absolute discretion to permit or outlaw abortions. Thus, women who were pregnant as a result of rape could be required to maintain their preg-nancies and be forced to go through labor and delivery with the rapist's unwanted child. Women who would become blind, paralyzed or suffer other grave injury as a result of the continuation of their pregnancy could be compelled by state legislatures to suffer such harm. Parents who, as a result of genetic counseling and testing, know that their child will be born with a genetic disease that will cause it to die a slow, painful death, could be required to carry that pregnancy to term. These examples are not based on wild speculation about what the state of the law *might* be if *Roe* were overruled—it is based on what the state of the

law *actually was* at the time of *Roe*. Prior to *Roe*, abortions were outlawed in a majority of states unless the *life* (not health) of the pregnant woman was jeopardized by the continuation of the pregnancy. *Roe*, 410 U.S. at 118.[34]

The abortion cases are not just about abortion, but about the very basis of what it means to be a free person in a free society.[35] If the state can make reproductive decisions on behalf of any individual, what decision is it precluded from making? If legislatures are allowed to impose without restraint value judgments that deeply and directly affect individual citizens, what is left of personal freedom? Without the right of privacy, what constitutional principle would prevent states from reimposing restrictions on contraceptive distribution and use, since unfertilized ova constitute *potential* human life? *Doe v. Bolton*, 410 U.S. at 217 (Douglas, J. concurring). Indeed, since both Missouri and the United States argue that the state should

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34 In its brief, the United States readily admits that states have passed "inflammatory" abortion statutes since *Roe* was decided. Brief for the United States as Amicus Curiae Supporting Appellants at 21, n.15. What is remarkable is that the United States blames the existence of *Roe* for the "inflammatory" nature of these statutes, rather than legislators' hostility to the right of pregnant women and their physicians to make decisions concerning termination of pregnancy. Should *Roe* be overruled, the tendency of legislatures to pass such inflammatory statutes will continue. What will be absent is the constitutional protection from such legislative excesses.

35 In *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), the Court noted that the constitutional right of privacy protects an individual's "interest in independence in making certain kinds of important decisions." In that case the Court upheld a New York statute requiring physicians to report to a state agency the prescription of certain controlled substances, because under the statute "the decision to prescribe, or to use, is left entirely to the physician and the patient." *Id.* at 603.

be free to determine when life begins, a state could choose any point in time it pleases-conception, live birth, the time the ovum develops, or three years of age.[36] Since there is no scientific answer to this question, any value judgment on this point is as "rational" as any other. However, just as this Court found that "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority," *Planned Parenthood v. Danforth*, 428 U.S. at 74, it should also conclude that one's constitutional rights are not destroyed magically because of an arbitrarily state-defined point at which "life begins."

The problem with providing the state with the essentially unlimited power sought by Missouri and the United States is that the state's actions have such a potentially profound impact on the lives of citizens. It must be kept in mind that the State is attempting to impose its values on individual citizens in order to control their decisional rights. Under *Roe* no one's values are imposed on anyone else; people are free to make the decisions that they believe are best for themselves. As Justice Stevens put it,

> In the final analysis, the holding in *Roe v. Wade* presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny. Arguably a very primitive society would have been protected from evil by a rule against eating apples; a majority familiar with Adam's

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36 *See*, Brief for The New England Christian Council as Amicus Curiae at 12. Therein is described an effort to place on the ballot in Massachusetts the following referendum question: "In *Biological Terms*, when does an individual human life begin?" The choices the voters could check off included "A. Conception" "B. Viability" "C. Birth" "D. Write In - specify a different term____."

> experience might favor such a rule. But the lawmakers who placed a special premium on the protection of individual liberty have recognized that certain values are more important than the will of a transient majority.

Thornburgh, 476 U.S. at 781-82 (concurring opinion).

II. THE RIGHT OF PRIVACY PROTECTS THE RIGHTS OF INDIVIDUALS TO MAKE PERSONAL MEDICAL DECISIONS IN A DOCTOR-PATIENT RELATIONSHIP

A. *The Doctor-Patient Relationship, not the Legislature, is the Proper Locus for Medical Care Decisions*

The central question before the Court is whether personal medical care decisions should be made by patients and their physicians, or by the state. The doctor-patient relationship is highly valued in our society.[37] The importance of the doctor-patient relationship to individual citizens increases in proportion to advances in medical science. These advances have made the consequences of many medical interventions increasingly dramatic in the lives and deaths of individual citizens and their families. The importance of who makes the treatment decision increases as the complexity of the options and the severity of the impact of treatment on the individual patient increases. *Roe* properly took full account of changing medical science. The central premise of *Roe* and *Doe*, that inherently personal medical decisions, including those

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37 Indeed, protecting the ethical integrity of the medical profession in ways consistent with the individual autonomy of patients has been deemed a "compelling state interest" by courts since *Roe v. Wade, E.g., In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), *cert. den. sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976); *Superintendent of Belchertown v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977).

involving abortion, should be made in the context of a doctor-patient relationship protected from governmental dictates, remains sound jurisprudence.

The doctor-patient relationship has been a privileged and protected one throughout the history of Western civilization. Plato, for example, describes how in Ancient Greece slaves were treated as objects and that therefore no conversation between them and the physician occurred. The relationship between a free physician and a free citizen, by contrast, fit what it means to be a free person; that is, physicians talked to their patients:

The free practitioner who, for the most part, attends free men, treats their disease by going into things thoroughly from the beginning in a scientific way, and takes the patient and his family into his confidence . . . He does not give his prescriptions until he has won the patient's support . . .

Laws, 4.720b-e.

The doctor-patient relationship between two free citizens that has become the cornerstone of Western medical ethics begins with an individual who determines that a condition requires medical attention. Medical attention is voluntarily sought, and the physician makes a decision as to whether or not medical care can be of benefit to the patient, and if so, recommends one or more alterna-tives. The doctor and patient then discuss these alterna-tives. Together they decide what course of action to pursue based on their perceptions of benefit in a private, confidential relationship which ethical prin-

ciples of autonomy, beneficence and justice have structured and the law has fostered and protected.[38]

The decision to continue or terminate a pregnancy is just one example albeit a dramatic one, of important, personal medical decisions made in this relationship. To insure that a mutually-acceptable decision is arrived at with full understanding, the common law has required physicians to share information with their patients under the doctrine of "informed consent."[39] Law and ethics, therefore, have now effectively merged. As the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research concluded,

> Although the informed consent doctrine has substantial foundations in law, it is essentially an ethical imperative. . . . Ethically valid consent is a process of shared decisionmaking based upon mutual respect and participation . . . adults are entitled to accept or reject health care interventions on the basis of their own personal values in furtherance of their own personal goals.

Making Health Care Decisions 2-3 (1982).

B. *States Should Not be Permitted to Dictate or Censor the Content of Discussions that Occur in a Doctor-Patient Relationship*

It is in the informed consent context, and its respect both for the rights of individual patients and the integrity of

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38 *See, e.g.*, Ad Hoc Committee on Medical Ethics, American College of Physicians, *American College of Physicians Ethics Manual*, Part I, 101 Annals of Internal Medicine 129, 130 (1984).

39 Legal action to remedy instances of nondisclosure developed where the Platonic ideal was not being followed and physicians were withholding important information from their patients. R. Faden & T. Beauchamp, *A History and Theory of Informed Consent* (1986).

the medical profession, that *Roe's* placement of the abortion decision with "the woman and her physician" is properly understood. Neither party has total or arbitrary power, but both must agree and consider the decision appropriate and reasonable before it can be acted on. *Roe* properly assumed that "states would subject the woman's wishes to interpersonal testing within a clinical relationship, by treating abortion as a medical procedure . . . A medical decision, at its best, is made between a patient and a doctor who acts pursuant to professional values, ones developed out of clinical encounters and subjected to peer criticism within a regimen of professional education, research, and ethical study." R. Goldstein, *Mother-Love and Abortion: A Legal Interpretation* 81 (1988); *see also* A. Jonsen, M. Siegler & W. Winslade, *Clinical Ethics* 62 (2d ed. 1986).

Of course, such an interpersonal dialogue can only take place in an atmosphere in which the physician is free to exercise his or her best professional judgment and discuss with a patient all of the information, including treatment options, relevant to the patient's decision. Section 188.205 of the Missouri statute before this Court, however, would prohibit such dialogue. That section makes it "unlawful for any public funds to be expended . . . for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." The term "encourage or counsel" is so vague that reasonable people would be unable to distinguish between lawful and unlawful behavior. It does not merely prohibit coercing a woman to have an abortion. Rather, the state uses words that describe the personal discussions between a woman and her physician about the management of her pregnancy. Other

courts have agreed that this language prohibits physicians from talking to their patients.[40]

In section 188.210, Missouri attempted to make it "unlawful" for a publicly-employed physician or other health care personnel to "counsel or encourage a woman to have an abortion not necessary to save her life." In this appeal, Missouri has abandoned any defense of this direct prohibition against counseling of patients by physicians. Instead Missouri seeks to achieve the same result by a different means in section 188.205. This section certainly prohibits any publicly-employed physician from counseling or encouraging abortions because it is unlawful to expend public funds for that purpose, and the physician's salary is derived from state funds. Thus, its impact is identical with the second sentence of section 188.210. In fact this section has an even wider impact than 188.210 because it applies not just to public employees, but to anyone who receives state funds.

The statute both silences physicians and forces patients to remain ignorant, erecting a state-created barrier between a woman and her physician. Under the stature [sic], for example, a physician, public or private, who receives state funds would be unable to honestly respond to a pregnant

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40 Two federal district courts found that the Department of Health and Human Services regulations prohibiting family planning programs funded under Title X from counseling or referring for abortion, 53 Fed. Reg. 2922 (Feb. 2, 1988), violated the First Amendment rights of the programs and enjoined their enforcement. *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), appeal docketed, No. 88-1279 (1st Cir. Mar. 24, 1988); *Planned Parenthood Federation v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988). A third district court agreed that the prohibition forbade speech but concluded (erroneously we believe) that granting Title X funds to support one idea and not another did not infringe free speech. *State of New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), *aff'd*., 863 F.2d 46 (2d Cir. 1988).

woman whose health is endangered by the pregnancy when she asks, "Doctor, what do you think I should do?", if the honest answer were, "I would recommend you have an abortion."[41]

Prohibiting physicians who receive state funds from "encouraging or counseling" pregnant women consistent with their best medical judgment is contrary to good medical practice and jeopardizes patients' rights. Informa-tion concerning health risks that are caused or exacerbated by pregnancy and information concerning possible fetal genetic or congenital disorders are squarely among the categories of information that a physician is obligated by law and ethics to disclose to a pregnant woman in order to facilitate knowledgeable decisions about managing her pregnancy.[42] It is good and accepted medical practice to in-

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41 An analogous "gag rule" is apparently in effect in the Soviet Union in the area surrounding Chernobyl where it is reported that government authorities assure everyone that all is normal, "and then advise villagers not to bear children or each locally grown mushrooms." When the villagers take their children to special government clinics in Kiev for regular medical tests, "the doctors refuse to disclose the results." Gumbel, *Villagers Suffering Chernobyl's Fallout Face Soviet Silence*, Wall Street J., March 6, 1989, at 1, col. 4.

42 The Federal Food and Drug Administration itself requires manufacturers of intrauterine devices to inform physicians that if a woman becomes pregnant with an I.U.D. in place, and removal of the I.U.D. is difficult, "termination of the pregnancy should be considered and offered the patient as an option..." 21 C.F.R. 310.502(b)(1). The physician's counseling obligation includes informing parents of the availability of prenatal diagnosis of genetic abnormalities. *E.g.*, *Goldberg v. Ruskin*, 128 Ill. App. 3d 1029, 471 N.E.2d 530 (1984), *aff'd*, 113 Ill. 2d 482, 499 N.E. 2d 406 (1986) (failure to advise parents of tests designed to detect Tay-Sachs disease). Physicians also have an obligation to diagnose abnormalities with due care and disclose their findings. *E.g.*, *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986) (fail-

quire into the genetic and medical history of a prospec-tive mother and father who consult any physician for advice or care concerning family planning, contraception, and pregnancy evaluation. *See* American College of Obstetri-cians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 18-19 (5th ed. 1985); S. Elias and G.J. Annas, *Reproductive Genetics and the Law* (1987); President's Commission for the Study of Ethical Problems in Medicine, *Screening and Counseling for Genetic Conditions* 23-31 (1983).

By attempting to silence certain physicians, Missouri seeks to prevent them from performing their ethical and legal obligations to their patients consistent with existing medical science, and thereby deprive patients of informa-tion they need in order to decide whether to have a child. In this regard the state of Missouri promotes ignorance, viewing an uninformed patient as a desirable result. There are medical conditions for which abortion is one of the reasonable medical procedures that should be discussed. For example, Tay-Sachs disease is a genetic disorder that occurs in one in four pregnancies when both husband and wife are carriers of the gene. The disease "is characterized by motor weakness, usually beginning between 3 and 6 months of age. . . deafness, blindness, convulsions, and generalized spasticity are usually in evidence by 18 months of age . . . the child develops a state of decerebrate rigidity, with death usually resulting . . . by 3 years

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ure to timely diagnose rubella and inform parents of consequences). So strongly have courts insisted on counseling, that they have held physicians liable for failing to offer information which might lead a patient to consider abortion even when abortion was statutorily proscribed in most states. *See e.g., Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975) (physician's failure to diagnose rubella in pregnant woman in 1958 and to advise her of risks to fetus held actionable wrong even though abortion was illegal in Texas).

of age. No specific therapy for Tay-Sachs disease is available." S. Elias & G. Annas, *Reproductive Genetics and the Law* 63 (1987) and sources cited therein. Since abortion is the *only* way to prevent this tragedy, a physician who informs a couple of the existence of prenatal testing to detect it, and discusses the option of abortion with them would be violating the proscription against "counseling or encouraging" abortion. Without the option of prenatal screening, many at risk couples would simply choose to abort all pregnancies. "In fact, since more than 95% of all prenatal diagnostic tests are negative, the overwhelming majority of such testing helps lead to the birth of children that might not otherwise have been born." *Id.* at 83. Thus the irony is that any law that inhibits physicians from counseling pregnant women about the availability of genetic testing and the option of abortion may actually increase the number of abortions performed.

Since section 188.210 prohibits publicly-employed physicians from *performing* abortions, it is essential that they be permitted to refer a patient in need of abortion to a physician who is willing and able to do so. Yet, such a medically appropriate referral would violate the proscription against encouraging and counseling, since abortion is a probable outcome of the referral. At the same time, failure to refer the patient to the second physician would be negligent medical practice which could harm the patient.[43]

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43 *See, e.g., Jewson v. Mayo Clinic*, 691 F.2d 405 (8th Cir. 1982). If a physician determines, in the exercise of sound clinical judgment, that the pregnancy poses a threat to the health or well-being of his patient, he is not excused from disclosing that judgment simply because he may be unable to perform an abortion. If he is unwilling or unable to perform an abortion that he believes is medically indicated, he must also disclose that fact to the patient. *Manion v. Tweedy*, 257 Minn. 59, 100 N.W.2d 124, 128 (1959). In addition, the physician must immediately refer the patient to an appropriate provider, because delay could

The fact that the physicians currently targeted by the Missouri statute are paid with state funds does not lessen either the extent of the invasion or the obligation such physicians have to counsel their patients.[44] Government-employed physicians who were not expected or obliged to render ongoing care to individuals have been found to owe a duty of disclosure to persons they examine. For example, in *Betesh v. United States*, 400 F. Supp. 238 (D.D.C. 1974), a selective service physician was found liable for failing to disclose a chest abnormality in a recruit during a pre-induction physical. The recruit later died of Hodgkins disease, which might have been successfully treated had treatment begun when the abnormality was first discovered. Even in the absence of a consensual doctor-patient relationship, concealment of the information was actionable, the court found, because "the Government physicians were under a duty to act carefully, not merely in the conduct of the examination, but also in subsequent communications to the examinee." *Id.* at 246. Thus, the legal and ethical obligation to counsel does not depend upon the nature of the physician's employer or source of payment.

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cause harm and make further treatment, including later termination of pregnancy, more risky and harmful. *See, e.g., Steele v. United States*, 463 F. Supp. 321, 330 (D. Alaska 1977); *Wells v. Billars*, 391 N.W.2d 668 (S.D. 1986).

44 The source of payment does not excuse a physician from fulfill-ing his obligations to his patient. As the California Appeals Court said in *Wickline v. California*, 192 Cal. App. 3d 1630, 1645, 228 Cal. Rptr. 661 (1986), *app. dism'd*, 239 Cal. Rptr. 805, 741 P.2d 613 (1987): "[T]he physician who complies without protest with the limitations imposed by a third party payor, when his medical judgment dictates otherwise, cannot avoid his ultimate responsibility for his patient's care."

The Missouri legislation not only interferes with honesty on the party of the physician, it does so in the most intrusive fashion, sundering the curtain of privacy from the physician-patient relationship. Not only does the state claim the right to control what doctors say to patients, it encourages strangers to police what is said. Section 188.220 of the Missouri statute grants standing to "any taxpayer of [the] state" to enforce the provisions which prohibit encouraging or counseling a woman to have an abortion. Thus, perfect strangers are given the power of private attorneys general to scrutinize the highly personal information discussed in a physician's office. The statute can only be enforced by requiring physicians and their patients to publicly disclose the content of their discussions held in the privacy of the doctor-patient relationship. Having strangers invade this relationship is every bit as offensive and chilling as permitting "police to search the sacred precincts . . . of marital bedrooms." *Griswold v. Connecticut,* 381 U.S. at 485.[45]

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45 A recent New York case underscores the inappropriateness of encouraging strangers to intervene in these private decisions. The case, *In the Matter of Martin Klein,* Supreme Ct. of New York, Nassau Cty. No. 1736/89 (Feb. 7, 1989), involved a 32-year-old woman who was 17 weeks pregnant, and comatose as a result of an automobile accident. Her husband was advised by her physician that continuation of her pregnancy presented a serious threat to her life, and that termination of the pregnancy was indicated. He then petitioned the court for an order that he be appointed his wife's temporary guardian for the purpose of authorizing her physician to perform such medical procedures, including abortion, as may be necessary to preserve her life. Two total strangers with an anti-abortion agenda petitioned the court requesting to be made the guardian of the woman and the non-viable fetus, in an attempt to exclude the patient's husband and parents from making these decisions. Both trial court and Appellate Division decided for the husband. As the Appellate Division stated, "these absolute strangers to the Klein family, whatever their motivations, have no place in the midst of this

C. *Overruling the Constitutional Right of Privacy Would Seriously Undermine Individual Autonomy and Would Permit the State To Make Medical Care Decisions That Belong to Individuals*

A consistent series of decisions since *Roe v. Wade* permit individuals to refuse various medical interventions. Many of these decisions are based in part on the constitutional right of privacy which enables individuals to make important personal medical decisions for themselves. In a widely cited case, for example, the New Jersey Supreme Court decided that, were she competent, Karen Ann Quinlan, a young woman in a permanent coma, would have the authority under the constitutional right of privacy to decide to have the mechanical ventilator that sustained her life removed. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, 663 (1976), *cert. den. sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976). Since she was incompetent, the court ruled that her parents could act in her behalf. In *Quinlan*, as in many similar cases decided since, the state argued that it, not the patient, should make the decision whether or not to employ an intrusive, and often futile, medical intervention.

Without the shield of the constitutional right of privacy, citizens would have no protection from such state interventions in private medical matters, because states would be free to legislate virtually any restrictions on individual treatment decisions that even a bare majority of legislators wished. This is particularly important today when new forms of medical treatment and knowledge require patients to make controversial choices. Since 1973, physicians have learned to fertilize human eggs in a petri

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family tragedy." *Matter of Nancy Klein*, New York Appellate Division, Second Department, New York Law Journal, Feb. 14, 1989, at 21.

dish and transfer the resulting embryo to the wife for gestation; to accurately detect severe fetal handicaps such as anencephaly and neural tube defects; and to maintain patients who cannot breathe on their own in a permanent coma for months and even years.

It would not be far-fetched to hypothesize a state that would choose to outlaw the use of *all* prenatal diagnostic techniques by both public and private physicians. Legisla-tors may feel that such tests lead couples either not to have children or to abort their pregnancies. Without the protec-tion of the constitutional right of privacy, state legislatures would be empowered to control the knowledge and use of such medical techniques, and require couples to make their child-bearing decisions in ignorance.[46] What would prohibit states from outlawing new and "unnatural" means of conceiving a child such as *in vitro* fertilization techniques? What would prohibit states from requiring that *every* medical intervention must be used to keep a dying person alive as long a biologically possible, regardless of the desires of the patient or family, and no matter that the patient's physician agrees that this would not be good medical practice? No constitutional principle, other than the right of privacy, would protect these decisions, and others like them, from being made for patients by the state. Unfettered by the constitutional right of privacy, states would

have virtually unlimited power both to prohibit citizens from obtaining basic medical care from their physicians, and to require them to undergo medical proce-dures against their will.

We have already witnessed examples of how state power can be misused in a way that increases the suffering of its citizens when the right to make personal medical decisions is not treated as a fundamental constitutional right. In one example, a competent pregnant woman who was dying of cancer was forced to endure a cesarean section against her will, and that of her family and physicians, by a judge who thought that the state's interest in potential fetal life outweighed any interest she might have in refusing surgical intervention. *In re A.C.*, 533 A.2d 611 (App. D.C. 1987), *vacated* 539 A.2d 203 (App. D.C. 1988).[47] After the forced surgery—which was, in effect,

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47 There are at least twenty-one orders by lower court judges that have required competent adult women to undergo cesarean section operations (a major surgical procedure which is substantially more life-threatening than abortion) instead of the normal delivery that they wished to have. Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 New Eng. J. Med. 1192 (1987). These orders were based on the notion that the state, through its judges, has a greater interest in the potential life of the fetus and the method of childbirth than the woman herself, and demeaned and dehumanized the pregnant woman by denying her the right to voluntarily choose the method of childbirth. Continued discussion with her physician, rather than hasty resort to emergency decisions by judges, is properly encouraged by recognizing the right to privacy in the doctor-patient relationship. Indeed, "By protecting the liberty of the pregnant patient and the integrity of the voluntary doctor-patient relationship, we not only promote autonomy; we also promote the well-being of the vast majority of fetuses." Annas, *Protecting the Liberty of Pregnant Patients*, 316 New Eng. J. Med. 1213, 1214 (1987). *And see* T. Engelhardt, *The Foundations of Bioethics* 224-27 (1985); and Nelson & Milliken, *Compelled Medical Treatment of Pregnant Women*, 259 J.A.M.A. 1060 (1988).

a forced abortion of a non-viable fetus—both mother and child died.

In a second example, with facts virtually identical to those in *Quinlan*, a Missouri trial court found that it had sufficient evidence, based on the patient's prior statements and her family's testimony, that the patient would not wish to receive treatment if she were in a permanent coma, and ruled that treatment should therefore be stopped in accordance with her "constitutionally guaranteed liberty." *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988). The Missouri Supreme Court overruled the trial court's finding and, disregarding the patient's previous statements and her parent's wishes, turned over her medical treatment decisions to employees of the state. This means that for the rest of her life the people who know and love her most are relegated to the role of passive observers. *See*, generally, Annas, *The Insane Root Takes Reason Prisoner*, 19 Hastings Center Report 29 (Jan./Feb. 1989). The Missouri Supreme Court's decision was based in part on its reading of the preamble of the abortion statute at issue in this case.

These examples demonstrate that state interference is not hypothetical. State medical treatment decisions are at best arbitrary and impersonal, and at worst cruelly at odds with a patient's wishes and well-being. This leads inexorably to the conclusion that personal medical decisions should be made by those who are most affected by them, in the context of a constitutionally-protected doctor-patient relationship.[48]

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48 Unlike the Missouri Supreme Court, in the vast majority of cases decided since *Roe*, courts have recognized that the constitutional right of privacy places control of personal medical decisions in the hands of patients or their guardians if the patient is incompetent. For example, courts have upheld the patient's right to decide whether to accept or

If the state is given absolute control of a decision as personal and private as the decision whether or not to continue a pregnancy, based on its interest in "potential human life," then it could certainly control these other decisions. If this Court adopts such a statist notion of decisionmaking then the value of "personhood" will have been significantly demeaned for all citizens. Having control over these most important and private decisions is an essential element not only of freedom, but of being a person. As the Massachusetts Supreme Judicial Court put it: "The constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life." *Saikewicz*, 370 N.E.2d at 426.

Missouri does not claim that its power is limited to prohibiting abortion. Their sole interest is in protecting *potential* life, rather than *existing* human life. What is most remarkable about virtually all of the briefs submitted to this Court on behalf of Missouri is that they imply that the United States is composed exclusively of state govern-ments and fetuses; women and their physicians are treated as almost irrelevant, and the relationship between a pregnant woman and her physician is ignored.

Missouri seeks to reintroduce the Platonic ideal in a particularly pernicious manner: men are to be treated as "free citizens"; women are to be treated in a manner simi-

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reject medical treatments such as surgery for breast cancer, *In re Yetter*, Northampton Co. Orphans Ct., No. 1973-533 (Williams, Jr.) (Pa. 1973); amputation, *Lane v. Candura*, 376 N.E.2d 1232 (Mass. App. 1978); kidney dialysis, *In the Matter of Spring*, 389 Mass. 629, 405 N.E.2d 115 (1980); respirators, *Satz v. Perlmutter*, 362 So.2d 160 (Fla. App. 1978), *aff'd.* 379 So.2d 359 (Fla. 1980); and artificial nutrition and hydration, *In the Matter of Jobes*, 108 N.J. 394, 529 A.2d 434 (1987).

lar to the way "slaves" were treated by free physicians in ancient Greece: conversation is to be censored and treatment decisions made without regard for the wishes of the patient. Such a situation is incompatible with both liberty and equal protection. As this Court has properly emphasized: "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government . . . That promise extends to women as well as to men." *Thornburgh*, 476 U.S. at 772 (1986).

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COMPASSION IN DYING, a Washington nonprofit corporation, JANE ROE, JOHN DOE, JAMES POE, HAROLD GLUCKSBERG, M.D., ABIGAIL HALPERIN, M.D., THOMAS A. PRESTON, M.D., and PETER SHALIT, M.D., Ph.D., Plaintiffs, vs. THE STATE OF WASHINGTON and CHRISTINE GREGOIRE, Attorney General of Washington, Defendants.	NO. C94-119 PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR FEBRUARY 25, 1994 ORAL ARGUMENT REQUESTED

Pursuant to Federal Rule of Civil Procedure 56 and CR 7 of the Rules of the United States District Court for the Western District of Washington, plaintiffs move for summary judgment. The reasons for granting plaintiffs' motion are set forth in Memorandum in Support of Plaintiffs' Motion for Summary Judgment, submitted herewith.

DATED: February 3, 1994.

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By /s/
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